FREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1360

SHEARN MOODY, JR., *Petitioner*

v

FLYING SAUCERS, INC., *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL. FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

HENRY H. TAYLOR, JR.
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Respondent prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on January 27, 1970 be denied.

QUESTIONS PRESENTED

1. Was it a violation of the due process clause of the XIV Amendment to the United States Constitution for petitioner, an individual and a resident of Texas, to be served in a diversity case brought in Florida by (a) service on the Florida Secretary of State and (b) mail service on petitioner and his attorneys in Texas, pursuant to the Florida Long Arm Statute, Florida Statute 48.181, under the factual situation presented in the instant cause?

STATEMENT

Respondent adopts the statement of facts as set forth in the Opinion rendered by the Fifth Circuit Court of Appeals in the herein cause, as set forth at pages 3A through 8A of the Appendix to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

The fundamental issue before this Honorable Court is whether or not the defendant's activities in the State of Florida, as reflected in the record on appeal, was sufficient to constitute "doing business" or engaging in a "business venture" within the meaning and purview of the Florida Long Arm Statute, Florida Statute 48.181.

The Fifth Circuit Court of Appeals below concluded that the activity of the defendant in the instant cause created sufficient *minimum contact* to bring the defendant within the reach of the Florida Long Arm Statute. The analysis of the relevant Florida and Federal cases construing the Florida Long Arm Statute as contained in the Fifth Circuit Court of Appeals opinion below is fully adopted by respondent herein.

The petitioner herein first suggests that the Fifth Circuit Court of Appeals below simply disregarded and ignored the raft of Florida cases wherein the Florida Courts have held that the Florida Long Arm Statute is to be "strictly construed." The implication of petitioner's suggestion in his brief is that the Fifth Circuit Court of Appeals gave a "liberal construction" of the Florida Long Arm Statute in adhering to the proposition that the Florida Long Arm Statute "was intended to be applicable to the fullest extent permissible within constitutional limits (due process under the XIV Amendment) upon the State's power to act extraterritorially." Petitioner further suggests that the Fifth Circuit's reliance upon its prior decisions in *Phillips v. Hooker Chemical Corp.*, 375 F. 2d 189 (5th Cir. 1967) and *Delray Beach Aviation Corp. v. Mooney Aircraft Co.*, 332 F. 2d 135 (5th Cir. 1964) in the opinion below, directly conflicts with the "strict

construction" mandate of the subsequent Florida case law construing the Florida Long Arm Statute. It is respectfully submitted that no such conflict exists. As a practical matter what constitutes "sufficient minimum contact" or "engaging in business" or "engaging in a business venture" must be decided on the facts peculiar to each case as it arises. The opinion of the Fifth Circuit Court of Appeals below clearly reflects its recognition of this practical fact of life. So also have the Florida Courts. The Supreme Court of Florida in *Strasser Construction Corp. v. Lyon*, 97 So. 2d 458, (Supreme Court of Florida 1957) in construing the Florida Long Arm Statute said:

> "We have also held that each case of this kind must be resolved on the basis of facts revealed by the record in the particular case. While certain general principles may be said to prevail the application of these principles will be governed by the factual situation presented by a particular record. *Mason v. Mason Products Co.* (Florida 1953); 67 So. 2d 762."

Clearly the classification dichotomy of "strict" versus "liberal" construction of the Florida Long Arm Statute, or any other statute for that matter, is nothing more than a legal justification for a Court's finding that the activities of a particular party constituted minimum contact, or doing business, or engaging in a business venture. Where the Florida Courts have found that no sufficient contact was shown under the facts of a particular case the Florida Courts have simply justified their findings of fact by the legal justification that the Florida Long Arm Statute must be "strictly construed." Conversely, where the Florida Courts have found sufficient minimum contact or activities constituting doing business or engaging in a business venture, the Florida Courts simply determine that the Florida Long Arm Statute is applicable. The suggestion of petitioner that the decision of the Fifth Circuit Court of Appeals below contravenes prior Florida case law is at best an attempt to create a semantic conflict as opposed to a real substantive conflict and should not form the basis for granting of the Petition for Writ of Certiorari herein.

The petitioner next suggests that the Florida Long Arm Statute requires that the party to be constructively served must have engaged in activity within the State of Florida for pecuniary gain. In *Dominguez v. Romsch*, 228 So. 2d 904 (Florida, 1969), the Court held:

> "(2) We hold the intent of the Legislature in enacting Florida Statute Sec. 48.181, F.S.A. to be that *any individual* or corporation who has exercised the privilege of practicing a profession or otherwise *dealing in goods, services or property*, whether in a professional or non-professional capacity, *within the State in anticipation of economic gain*, be regarded as operating a business or business venture for the purpose of service under Florida Statute Sec. 48.181, F.S.A., in suits resulting from their activity within the State. As indicated in Matthews v. *Matthews*, *Matthews*, 122 So. 2d 571, 573 (Fla. App. 2d 1960), the activities of the person sought to be served must be considered "collectively" and shows a general course of employment and conduct of carrying on business activity in the State for *pecuniary benefit*. . . ." (emphasis added)

Petitioner suggests in his brief that by no possible stretch of the imagination could the alleged purchase of this yacht for pleasure purposes be said to constitute activity engaged in for pecuniary gain. Respondent takes issue with this contention. The phrases "*economic gain*," "*pecuniary gain*," or "*pecuniary benefit*" cannot properly be limited to a dollar and cents construction. The activities of Shearn, Moody, Jr., in hiring a captain for the vessel, contracting with Allied Marine Corp. for dockage for the vessel, arranging for day-by-day care of said vessel, contracting for preparation of drawings and specifications for the conversion of the vessel, contracting for services and materials to be supplied for said vessel, negotiating with various vendors in Miami, Florida for installation of radios, air conditioners, and other necessities, was clearly designed to preserve and or enhance the value of the vessel and to prevent the vessel from deteriorating in value. The activities of the petitioner constituted dealing in property within the State in anticipation of economic gain and pecuniary benefit in the nature of pre-

serving and maintaining the asset and enhancing its value.

Petitioner next suggests that the Florida Long-Arm Statute may not be extended to an individual to the same extent that it is extended to a corporation. It is significant to note, however, that at no stage during the proceedings in this cause has there ever been raised any issue with respect to the "constitutionality" of the Florida Long Arm Statute as it relates to an individual. Indeed, the provisions of the Florida Long Arm Statute are clearly intended to extend equally to individuals as well as to corporations. In *McCarthy v. Little River Bank & Trust Company*, 224 So. 2d 338 (Fla. App. 1969), The Third District Court of Appeal of Florida held:

> "(1) There is no question that the provision of Fla. Stat. Sec. 48.181, F.S.A. applies to individuals. The question of whether the individual, Robert McCarthy was engaged in or carrying on a business venture within the State of Florida should be resolved on the basis of the facts revealed by the record in this particular case. See Strasser, supra. We do not believe that the term "business venture" includes or applies exclusively to commercial transactions for benefit. See Kochenthal v. Kochenthal, 28 A.D. 2d 117, 282 N.Y.S. 2d 36 (2nd Dept., 1967); Van Wagenberg v. Van Wagenberg, 241 Md. 154, 215 A. 2d 812 (1965); San Juan Hotel Corp. v. Lefkowitz, 277 F. Supp. 28 (D.P.R. 1967). . . ."

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari should be denied.

HENRY H. TAYLOR, JR.
Taylor, Brion, Buker, Hames,
Greene & Whitworth
Counsel for Respondent

CERTIFICATE OF PROOF OF SERVICE

I, HENRY H. TAYLOR, JR., Attorney for Respondent, FLYING SAUCERS, INC., and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the ____ day of April, 1970, I served copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION on the several parties thereto as follows:

On SHEARN MOODY, JR., Petitioner, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

TO: WILLIAM D. DECKER, ESQ., 307 Cotton Exchange Building, Galveston, Texas, 77550, Attorney for Petitioner;

TO: E. BARRETT PRETTYMAN, JR., 815 Connecticut Avenue, Washington, D. C. 20006, Attorney for Petitioner.

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